FILE COPY

FILED
OCT 21 1930
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1930.

No. 402.

THOMAS M. WAMPLER,
Appellant,

versus

EDWIN LEE LECOMPTE, FREDERICK S. BARBER,
Appellees.

MOTION OF APPELLEES TO DISMISS OR AFFIRM.

ROBERT H. ARCHER,
WILLIAM L. MARBURY, JR.,
Counsel for Appellees.

In The

Supreme Court of the United States

October Term, 1930.

No. 402.

THOMAS M. WAMPLER,
Appellant,

versus

EDWIN LEE LECOMPTE, FREDERICK S. BARBER,
Appellees.

MOTION OF APPELLEES TO DISMISS OR AFFIRM.

Come now the appellees in the above entitled cause, by their counsel of record, and move that the appeal herein be dismissed or that the judgment of the Court of Appeals of Maryland be affirmed for the reason that the questions on which the decision in this case depends, are so unsubstantial as not to need further argument, and do not present any substantial federal question.

ROBERT H. ARCHER,

WILLIAM L. MARBURY, JR.,

Counsel for Appellees.

BRIEF IN SUPPORT OF MOTION TO DISMISS OR AFFIRM.

This case originated in the Circuit Court for Charles County, Maryland, and comes to this Court from the Court of Appeals of that state. As appears from the assignments of error heretofore filed by the appellant, reliance is placed solely on the contention that Sections 40, 41 and 46 of Article 99 of the Code of Public General Laws of Maryland are in conflict with the Fourteenth Amendment to the Constitution of the United States. These sections are part of a complete revision of all the conservation laws of Maryland, and appear under the sub-title "Water Fowl and Migratory Birds. Use of Boats Prohibited. Blinds," this sub-title consisting of Sections 38 to 49, inclusive, of Article 99 of the Code. (See *Bagby's Annotated Code of Maryland*, 1929 Supplement). The sections particularly complained of are printed as an Appendix hereto. Their purport is stated by the Court of Appeals in the decision below (not officially reported; see 150 Atl. 455), as follows:

"Section 40 of Article 99 provides that all owners of riparian rights on the waters of this state shall by virtue of said ownership be first entitled to make a choice of position in front of their property for the purpose of erecting and maintaining a booby, brush or stake blind, provided they avail themselves of such right by obtaining a license therefor, as required by Section 44 of said Article and by marking the location and erecting the blind in the manner and within the times therein stated.

"Section 41 of said Article provides that it shall be unlawful to erect or maintain any blind at a greater dis-

tance than 300 yards from the natural shore from which same may be erected; and not less than five hundred yards apart measured in a straight line, except 'in the tributaries of the Chesapeake Bay and in the tributaries of the Potomac River in Charles County and on the waters of Baltimore County,' where 'said blinds shall not be less than 250 yards apart, measured in a straight line.'

"Section 46 of said Article provides that 'whenever an owner of land bordering on any waters of this State shall desire to erect a booby, brush or stake blind in front of his property, or other person to whom he shall give permission, he shall not place same within 250 yards of the dividing line of any property owned by him and the adjoining property bordering on said waters (the distance contained herein shall not apply to the waters that are tributary of the Chesapeake Bay and the Potomac River in the Counties of Charles, Calvert and St. Mary's) meaning a line extending out over the waters drawn direct from the dividing line of said properties at the shore line, unless with the consent of the adjoining landowner, same being for the purpose of allowing each landowner bordering on any of the waters of the State permission to avail himself of the privilege of setting, erecting or maintaining a booby, brush or stake blind in front of his property."

The appellant objects to these provisions on two grounds:

(a) Because of discrimination between the waters that are tributary to the Chesapeake Bay and the Potomac River in the counties of Charles, Calvert and St. Mary's, and the other waters of the state;

(b) Because of the prohibition against the erection of any blind within 250 yards of the division line, which may be waived by the adjoining owner.

These contentions, it is respectfully submitted, have been fully answered by prior decisions of this Court, and present no substantial federal question. The appellant does not contend that the state has not plenary power to regulate or prohibit the erection of ducking blinds below high water mark. That this power exists is established by the decisions, on two grounds: (1) that the soil below low water mark belongs to the state, *Smith vs. Maryland*, 18 How. 71; *McCready vs. Virginia*, 94 U. S. 248; (2) that the state has full power to conserve game and other wild life, *Manchester vs. Mass.*, 139 U. S. 240; *Lawton vs. Steele*, 152 U. S. 137; *Geer vs. Connecticut*, 161 U. S. 519.

Accordingly it is not disputed that the state may properly prescribe the position of ducking blinds.

The contention that the law is not uniform as to all of the waters of the state is without substance. Statutes creating restrictions on the taking of wild life which are local in character, and which are limited in their territorial ambit, have repeatedly been sustained. Thus *Manchester vs. Massachusetts, supra,* sustained an act relating solely to the waters of Buzzard's Bay. See also *Lawton vs. Steele, supra.*

The contention that the Act discriminates between riparian owners is equally unsubstantial. If the state, as is conceded, has power to prescribe the interval at which ducking blinds may be erected, then it has power to protect riparian owners from being deprived of the vilege of erecting such blinds by the conduct of adning owners in placing blinds at a point near the

division line between the properties. *Lindsley vs. Natural Carbonic Gas Co.*, 220 U. S. 78; *Walls vs. Midland Carbon Co.*, 254 U. S. 300; *Bacon vs. Walker*, 204 U. S. 311; *Gorieb vs. Fox*, 274 U. S. 604. The provision permitting adjoining owners to consent to the erection of blinds nearer to the division line than the distance fixed by the statute is similar to that sustained in *Cusack Co. vs. Chicago*, 242 U. S. 526.

This Court has recently twice refused to grant a writ of certiorari for the purpose of bringing up cases presenting a question exactly analogous to that here involved. See *Oxford Co. vs. Atlantic Co.*, 22 F. (2) 597. Certiorari denied 277 U. S. 585. *Marrs vs. Oxford Co.*, 24 F. (2) 541. Certiorari denied 280 U. S. 573. The statutes there involved prescribed the intervals and fixed the distance from adjoining property lines at which wells for oil or gas might be drilled.

Respectfully submitted,

ROBERT H. ARCHER,

WILLIAM L. MARBURY, JR.,

Counsel for Appellees.

APPENDIX.

The provisions of Article 99 of the Code of Public General Laws of Maryland complained of in this case are found in Bagby's Annotated Code of Maryland, 1929 Supp. and are as follows:

"Sec. 40. All owners of riparian rights, their lessees or licensees on the waters of this State shall, by virtue of said ownership, be first entitled to make a choice of the "set" or position in front of the property of which they are the owners of the riparian rights, lessees or licensees, for the purpose to erect, set or maintain booby, brush or stake blind or blinds, provided, that said riparian owners, their lessees or licensees shall avail themselves of said choice of localities and clearly mark the same on said waters by erecting a stake, on which shall appear the license number of each blind and the licensee's name as hereinafter provided on or before October 10th of each and every year, and said blind or blinds licensed prior to October 10th must be erected on or before November 10th and said blind or blinds licensed after November 10th must be erected on or before twenty days thereafter, except as herein provided.

(a) For the protection of shoreowners, their lessees or licensees, desiring to locate a blind or blinds on their shore, the purchase of a license as herein provided and the establishment of a stake on which shall be painted the license number and the name of the licensee, such stake not to exceed the lawful distance from shore and be established in the water, when said stake shall be established on or before October 10th, then said stake shall be termed as a blind as hereinafter provided.

(b) No booby, brush or stake blind shall be licensed or erected in the waters of Chester River and its tributaries within the jurisdiction of Kent County except Grey's Inn Creek, Comegy's Bight and between a line drawn from Beaver Dam in Hail Creek, Kent County, to Stoney Bar Bluff at the mouth of

Jackson's Creek in Queen Anne's County, and Drum Point in Kent County; and no booby, brush or stake blind shall be licensed or erected in the waters of the Chesapeake Bay within the jurisdiction of Kent County between the north end of Hickory Thicket and the mouth of the Chester River.

(c) This section shall not apply to any person who has an established licensed blind or blinds located in the waters of Anne Arundel County or in the waters of the Chesapeake Bay opposite the shore line of said county prior to January 1st, 1927, and said licensee shall have the right to renew said license on or before the first day of July of each year thereafter.

(d) No booby, brush or stake blind shall be licensed or erected in the waters of Bohemia River and its tributaries, within the jurisdiction of Cecil County."

"41. It shall be lawful in or over the waters to erect, set or maintain a booby, brush or stake blind, and same shall be stationary; in which shall be built a platform for the purpose of shooting from. It shall be unlawful to erect, set or maintain any blind at a greater distance than 300 yards from the natural shore, from which same may be erected. Said blinds shall not be less than 500 yards apart measured in a straight line; provided, however, it shall be unlawful in or over the waters of Baltimore County to erect, set or maintain any blind at a greater distance than 150 yards from the natural shore.

(a) It shall be unlawful on any of the rivers of this State for any person to erect, set or maintain a blind at a farther distance from the shore than one-half of said river where said river is less then 600 yards in width, nor shall any person place any blind on any of the rivers across any channel where said channel runs near the center of said river.

(b) Provided, however, that in the tributaries of the Chesapeake Bay and in the tributaries of the Potomac River in Charles County and on the waters

of Baltimore County said blinds shall not be less than 250 yards apart measured in a straight line. However, the 250 yards as provided in Paragraph A of Section 46 of this Article, shall not apply to Baltimore County."

"46. Any person who shall obtain a license as provided for in this Article to erect a blind and the same may thereafter be destroyed in any manner beyond the control of the owner, shall ~~have~~ thirty days in which to replace or restore same without losing the set which the same formerly occupied.

(a) Whenever an owner of land bordering on any waters of this State shall desire to erect a booby, brush or stake blind in front of his property, or other person to whom he shall give permission, he shall not place same within 250 yards of the dividing line of any property owned by him and the adjoining property bordering on said waters (the distance contained herein shall not apply to the waters that are tributary of the Chesapeake Bay and the Potomac River in the Counties of Charles, Calvert and St. Mary's), meaning a line extending out over the waters drawn direct from the dividing line of said properties at the shore line, unless with the consent of the adjoining landowner, same being for the purpose of allowing each landowner bordering on any of the waters of the State permission to avail himself of the privilege of setting, erecting or maintaining a booby, brush or stake blind in front of his property."